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NO. 1193

IN THE

Supreme Court of the United States

October Term, 1965

BROWN & ROOT, INC., *Petitioner*

-versus-

AMERICAN HOME ASSURANCE COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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AMERICAN HOME ASSURANCE COMPANY,
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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

Brown & Root, Inc., in the District Court respondent and claimant of the Tug R. A. TURRENTINE, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming in part the interlocutory decree in admiralty of the United States District Court for the Southern District of Texas, Houston Division, in favor of libellant American Home Assurance Company and remanding the cause for further proof and consideration upon libellant insurance company's claim to recover from

petitioner its own company expenses. The trial court allowed recovery in full of the insurance company's own expenses in addition to the monetary losses of its insured, recovery of which was also allowed in full. The Court of Appeals held such full allowance of the insurance company's own expenses to be erroneous, and that the trial court should have allowed recovery only of such expenses as a reasonably prudent uninsured claimant would have incurred, to determine which the cause was remanded.

Opinions Below

The opinion of the Court of Appeals is reported at 353 F.2d 113 and appears *infra* Appendix, p. 21, et seq. The unreported opinion of the United States District Court is printed *infra* Appendix, p. 31, et seq.

Jurisdiction

The decision of the Court of Appeals for the Fifth Circuit was entered on November 31, 1965, and copy thereof is printed *infra* Appendix, p. 35. Thereafter petitioner presented to the Court of Appeals petition for rehearing, which was denied without further opinion on December 29, 1965, judgment thereon being entered on January 6, 1966.

Jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C. 1254(1).

Jurisdiction of the United States District Court for the Southern District of Texas lay under the Act of June 25, 1948, c. 646, 62 Stat. 931, amended Act of May 24, 1949, c. 139, Section 79, 63 Stat. 101, 28 U.S.C. 1333(1).

The Questions Presented for Review

This petition presents the following questions:

1.

An insurance company indemnifies a shipper against cargo losses. A casualty occurs to the shipment in transit. Immediately upon being notified by the insured, the insurance company engages its own agent and dispatches him to the scene of the casualty to investigate the circumstances of the loss and to determine its amount. He later supervises repairs to some cargo not competely lost.

After paying in full the amount of the insured's loss, the insurance company sues in its own name as subrogee to recover from a third-party this amount so paid the insured. In addition it sues to recover on its own account its own expenses, the sums it paid to its agent.

Can an indemnity insurance company recover from a third-party its own voluntarily incurred expenses *in addition* to the sums paid under the policy to its insured, or is the indemnity insurance company's recovery limited by subrogation only to the sums paid its insured, as expressly so held by this Court in *Phoenix Ins. Co. of Brooklyn v. Erie & Western Transportation Co.*, 117 U.S. 312, 6 S.Ct. 750 at 756 (1886), *Liverpool & G. W. Steam Co. v. Phenix Insurance Co.*, 129 U.S. 397, 9 S.Ct. 469 (1889), *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U.S. 223, 11 S.Ct. 554, 557 (1891), and *Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 175 U.S. 91, 20 S.Ct. 33 (1899)?

2.

A shipper, using its own prepared, printed short form bill of lading, delivers cargo for water carriage to a carrier

engaged only in transporting bulk cargoes on inland waterways. Cargo is lost under circumstances where the water carrier would be absolved from liability by provisions of the Harter Act.

The shipper's bill of lading expressly incorporates for ". . . rail or rail-water shipment", the Uniform Domestic Straight Bill of Lading which of course contains the exculpatory provisions of the Harter Act; and the bill of lading further provides "If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is carrier's or shipper's weight", a requirement of law for water shipments found only in the Harter Act.

Can a shipper so conditioning the terms of carriage rightfully contend that the bill of lading does not allow the carrier by water the Harter Act defenses, or is the shipper as the preparer of the bill of lading bound by such defenses under the settled rule that any ambiguities in written instruments are construed against the maker, as decided by this Court in *Calderon v. Atlas S. S. Co.*, 170 U.S. 272, 18 S.Ct. 588 at 591 (1898)?

3.

A company engages in the business of transportation of bulk commodities on the inland waterways, using to carry such commodities barges towed by tugs. It issues as carrier bills of lading to shippers. To perform these contracts of carriage it employs not only its own tugs and barges but on occasions tugs and barges which it charters from other companies.

Cargo is lost from a towed barge, the tug and the barge actually performing the transportation contracted for having been chartered by the carrier. The shipper named in

the bill of lading, through its subrogated insurance company, does not sue the carrier company but instead sues the tug owner, claiming negligent towage.

Is such transportation under a carrier's bill of lading affreightment, as held by this Court in *Sacramento Navigation Company v. Salz*, 273 U.S. 326, 47 S.Ct. 368 (1927), so that the tug owner is entitled to the carrier's defenses including those provided for in the bill of lading, or is the cargo owner entitled to avoid the bill of lading and sue the tug owner directly on the ground that the relationship was only towage?

4.

Where the undisputed testimony of the tug's crew was that the cargo was lost without any negligence when the barge stranded upon an uncharted shoal in the navigable channel, and such account of the stranding was corroborated and agreed to by the insurance company's own agent upon the basis of the investigation he made at the scene immediately after the stranding, and the claim of the insured under the policy adopted as its basis such account of the loss, and the trial court erroneously followed an earlier decision in a different case between the same parties and made no detailed fact findings, can the Court of Appeals make speculative findings of fact to affirm the trial court's judgment, contrary to the settled rule that speculation cannot do duty for probative facts, as so held by this Court in *Galloway v. United States*, 319 U.S. 372, 63 S.Ct. 1077, at 1089 (1943)?

Statutes Involved

The statutory provisions involved are primarily Sections 3 and 4 of the Harter Act, 46 U.S.C. §§ 192 and 193,

being the Act of February 13, 1893, c. 105, §§ 3 and 4, 27 Stat. 445, as follows:

"§ 192. Limitation of liability for errors of navigation, dangers of the sea and acts of God

"If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

"§ 193. Bills of lading to be issued; contents

"It shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described."

The other statutory provisions involved are certain portions of Sections 302 and 303 of the Interstate Commerce Act, Part III, Water Carriers, 49 U.S.C. §§ 902 and 903.

The pertinent portions of Section 302 are these:

"§ 902. **Definitions**

"For the purposes of this chapter—

* * *

"(c) The term 'water carrier' means a common carrier by water or a contract carrier by water.

"(d) The term 'common carrier by water' means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to chapter 1 of this title in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to chapter 1 of this title.

"(e) The term 'contract carrier by water' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) of this section and the exception thereto) by water of passengers or property in interstate or foreign commerce for compensation.

* * *

"(f) The term 'vessel' means any watercraft or other artificial contrivance of whatever description is used, or is capable of being, or is intended to be, used as a means of transportation by water.

* * *

"(i) The term 'interstate or foreign transportation' or 'transportation in interstate or foreign commerce',

as used in this chapter, means transportation of persons or property—

"(1) wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States;

"(2) partly by water and partly by railroad or motor vehicle, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States, and shall include transportation by water only insofar as it takes place from a place in the United States to another place in the United States;

"(3) wholly by water, or partly by water and partly by railroad or motor vehicle, from or to a place in the United States to or from a place outside the United States, but only (A) insofar as such transportation by rail or by motor vehicle takes place within the United States, and (B) in the case of a movement to a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein prior to transshipment at a place within the United States for movement to a place outside thereof, and, in the case of a movement from a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein after transshipment at a place within the United States in a movement from a place outside thereof."

(Section 902, (c), (d), (e), (f), and (i), Title 49 U.S.C.; Portions of Act of Feb. 4, 1887, c. 104, Pt. III, § 302, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 929.)

The pertinent portion of Section 303 is as follows:

> **"§ 903. Application of provisions; exemptions**
>
> "(b) Nothing in this chapter shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, on September 18, 1940, to the provisions of the Intercoastal Shipping Act, 1933, as amended."

(Act of Feb. 4, 1887, c. 104, Pt. III, § 303, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 931.)

Statement

Respondent American Home Assurance Company by its indemnity policy insured Dresser Industries and its subsidiary companies, of which Magnet Cove Barium Corporation and Magcobar, Inc., were such, against loss of and damage to their property while being transported by a carrier. Having paid its insureds Magnet Cove Barium Corporation and Magcobar, Inc., $31,430.49 for the full loss and damage to a shipment of drilling mud in cans shipped under a bill of lading with the carrier Magco Towing Co., American Home sued *not* the carrier but instead the owner of the tug which was towing the barge at

the time of loss. This suit was brought as subrogee under the loan receipt given respondent by its assureds. Libellant's Exhibit 22; R. 11 and 12.

In addition, respondent insurance company sued petitioner for the amounts it paid its own hired investigating surveyor and salvor, a Mr. Dierlam. R. 12.

The insured Magnet Cove Barium Corporation using its own printed short form bill of lading contracted with the carrier Magco Towing Co. for transportation of a cargo of drilling mud in cans from Brownsville to Corpus Christi, Texas. (The bill of lading, the pertinent language of which is identical in its several parts, appears at R. 90-94. A copy magnified for reading ease is attached as Appendix IV.)

The carrier Magco Towing Co. was a company which transported bulk commodities, on barges towed by tugs over the inland waterways of Texas and Louisiana. It was admittedly a contract water carrier and a private carrier. R. 138-139. Since it transported commodities for a number of corporate persons, R. 665-666, it was arguably a common carrier by water, though it had no certificate of convenience and necessity issued by the Interstate Commerce Commission since it was only a bulk commodity carrier and as such exempt by Section 903(b) of Title 49, U.S.C.

In the performance of its transportation contracts Magco Towing Co. sometimes employed tugs and barges it itself owned, and at other times it chartered and used tugs and barges owned by other companies. The cargo here involved was being transported aboard another owner's barge so chartered to Magco Towing Co., towed by a tug chartered from petitioner. R. 186, 236, 237.

The circumstances of the cargo loss were these:

The tug pushing the barge ahead of it was proceeding in darkness in a land-cut portion of the Intracoastal Waterway when the barge stranded on a shoal, and the barge tilted and dumped much of its cargo. The only witnesses to the stranding were the tug's captain and mate, who testified that the barge grounded on an uncharted shoal that was in the navigable channel, apparently built up by sand washing into the channel from the soft left bank. R. 557-559; R. 590-591. The stranding was a little to the left of the centerline, inside the channel. R. 565-566; 504-505; 591.

The cargo loss was immediately reported to the carrier who in turn notified the respondent insurance company. The next day respondent dispatched its own surveyor-investigator to the scene of the casualty (where the tug and barge had stayed). R. 371, 395. This agent of respondent viewed the canal and the banks and the vessels there, and he took statements from the crew and made photographs. R. 376, 377. Later at Brownsville he checked on the repairs made to salvaged cans. R. 386, 387.

Respondent's agent Dierlam testified he was told that the barge stranded on a shoal built up in the channel from bank sand drainage, and *not outside* the channel, and he so reported to his superior agents, R. 426, 427, referring them to the attached photographs he took on the spot. Please see particularly the two photographs marked Libellant's Exhibits 24 and 31 and Dierlam's notation on the latter photograph.

The assureds' proof of loss, Libellant's Exhibits 21 and 22, adopted respondent's agent Dierlam's account of the loss as having been caused by a stranding on the left side of the canal. R. 360-361. Only when the matter was being prepared for suit by respondent was the contention put

forward that the stranding occurred outside of the navigable channel limits. R. 426-427, 429.

The trial court followed another case of cargo lost at another time on another voyage, litigated between the same parties, affirmed by the Court of Appeals for the Fifth Circuit in 279 F.2d 811. The Court stated that the only difference between the cases was that in the instant case petitioner attempted in vain to show an oral agreement in the nature of deceit and estoppel. It then went on to "therefore hold as a matter of law that the tow (sic) was negligent in its handling of the barge", proximately causing the cargo loss.

In addition to allowing recovery of the respondent insurance company's payment of its insureds, the trial court further allowed in full the amounts paid the insurance company's surveyor.

With regard to the stranding and loss having been negligently caused, the Court of Appeals found the evidence "thin" but "thick enough" for a reviewing court. Acknowledging the admissions negating negligence in the reports made by the respondent's surveyor after his on-the-spot investigation, and in the assured's claim, it held these could lawfully be explained and retracted, and that while the oral testimony was clear that the barge stranded within the channel limits inferences could be drawn that the witnesses were in error where the center line was actually covered with water and therefore undisclosed, so that it was a permissible inference that the tug was negligent.

Expressing strong doubts about the legal basis for its own decision in the prior case between these parties, the Court of Appeals found here that the bill of lading was a contract of private carriage that did not expressly embody

the Harter Act defenses, and that the petitioner had not established to the satisfaction of the trier of fact that it was a beneficiary of the contract nor had secured for itself the Harter Act defenses.

On the allowance of the surveyor's fees and expenses, the Court held that for his services where he had acted solely for the underwriter the amounts paid the surveyor are certainly not recoverable. But it remanded the cause to determine to what extent the surveyor's actions and expenses "were reasonably attributable to the actions of a prudent uninsured cargo owner", which it held would be recoverable.

Reasons for Granting the Writ

1. The Court of Appeals holding that an indemnity insurance company can recover from a third-party tortfeasor some of the expenses it has deliberately incurred on its own account as though it were an uninsured cargo owner is a striking contradiction—how can an insurance company ever logically or reasonably have the status of an uninsured owner?

This decision is in direct conflict with the numerous decisions of this Court holding unequivocally that an indemnity insurance company when making claims against a third-party has the same rights, and no greater rights than, those of its insured. In *Phoenix Ins. Co. of Brooklyn v. Erie & Western Transportation Co.*, 117 U.S. 312, 6 S.Ct. 750, 756 (1886) this Court held that the insurance company had no rights against a third person except such as were its assured's saying:

> "Nor does this conclusion impair any lawful rights of the insurer. His right of subrogation, arising out of the contract of insurance and payment of the loss, is

> only to such rights as the assured has, by law or contract, against third persons."

This rule has been repeatedly affirmed, particularly in *Liverpool & G. W. Steam Co. v. Phenix Insurance Co.*, 129 U.S. 397, 9 S.Ct. 469 (1889), *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U.S. 223, 11 S.Ct. 554, 557 (1891), and *Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 175 U.S. 91, 20 S.Ct. 33 (1899). Many cases in accord from the American courts are collected in 29A Am. Jur., p. 799 (Insurance, §1720, Extent of Right, Dependence Upon Rights of Insured).

The decision below is in direct conflict also with a recent decision of the Court of Appeals for the Fifth Circuit itself, *Peoples Loan and Finance Corp. v. Lawson*, 271 F.2d 529 (5 Cir. 1959).

There are no decisions in accord with the holding.

Finally, this novel rule would if allowed to stand as lawful have wide-spread mischievous effects in insurance company claims against third persons: There would be no longer any certainty with respect to what sums with which a third-party would be legally confronted, and an insurance company could contend it was entitled to recover many of the normal expenses incurred in carrying on its business.

2. In holding that the towing tug could not have the same status of the carrier under the issued bill of lading the Court of Appeals clearly overlooked the express term of the bill of lading which here states (please see Appendix 37).

> "Received . . . the property . . . which said carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property) agrees to carry."

Since the whole basis of the suit against petitioner was that its tug and crew were in possession of the cargo when it was lost, plainly these contractual provisions make petitioner the carrier under the bill of lading.

Assuming here only for the purposes of discussion that the carrier named in the bill of lading was a private carrier and not a common carrier which would without agreement be entitled to the Harter Act defenses, it is respectfully submitted that the bill of lading taken as a whole undoubtedly embodied within its terms the provisions of the Harter Act. The intention of the parties was plainly to cover by this bill of lading the surface, water shipment contracted for. For rail, or "railwater" shipment the terms of the Uniform Domestic Straight Bill of Lading were expressly incorporated by reference. (The Harter Act defensive provisions of this Uniform Domestic Straight Bill of Lading are printed in Appendix____). That water carriage without joint carriage also by rail would be subject to the Harter Act provisions was contemplated is clearly shown by the provision

> ". . .If the shipment moves between two ports by water, the law requires that the bill of lading shall state whether it is 'carrier's or shipper's weight'."

The only transportation law where such a requirement occurs is in the Harter Act, which in Section 4 of the Act, 46 U.S. Code §193, requires that the bill of lading must state ". . . whether it be carrier's or shipper's weight": the draftsman of the bill of lading here lifted the words he used directly out of the Harter Act, plainly showing that the bill of lading was intended to be used for water carriage and to be subject to the provisions of the Harter Act.

But even if by use of the term "rail-water" the bill of lading be deemed ambiguous in its incorporation of the Harter Act defenses, any ambiguity in this regard must lawfully be resolved against the shipper Magnet Cove Barium Corporation, for it undoubtedly prepared the printed bill of lading and is bound by the rule as stated in *Calderon v. Atlas S. S. Co.*, 170 U.S. 272, 18 S.Ct. 588 at 591 (1898)

> ". . . A party to a contract is responsible for ambiguity in his own expressions, and has no right to induce another to contract with him on the supposition that his words mean one thing while he hopes the Court will adopt a construction by which they would mean another thing more to his advantage. Clark Cont. p. 593."

3. The trial court understandably held itself bound by the prior decision in *The R. A. Turrentine v. American Home Assurance Company*, 279 F.2d 811, 1960 A.M.C. 1429 (5 Cir. 1960), cert. denied, 364 U.S. 914, 81 S.Ct. 278, rehearing denied, 364 U.S. 944, 81 S.Ct. 458 (1961) to hold that the bill of lading contract between the insured and the named carrier Magco Towing Co. did not create a contract of affreightment but only as to the tug owner was a contract of towage. The decision in *Mississippi Valley Barge Line Co. v. T. L. James & Co.*, 244 F.2d 263, 1957 A.M.C. 1647 (5 Cir. 1957), cert. denied, 355 U.S. 871, 78 S.Ct. 121 (1957) on which The R. A. TURRENTINE was based the Court of Appeals now recognizes as in direct conflict with its decision (which was affirmed by this Court) in *River Terminals Corporation v. Southwestern Sugar & Molasses Co.*, 253 F.2d 922, 1958 A.M.C. 1534 (5 Cir. 1958), affirmed in part 360 U.S. 411, 79 S.Ct. 1210 (1959), and with decisions in other circuits.

Instead of holding, however, that consequently the undisputed facts here establish that the tug owner here is one and the same as the carrier and the cargo owner bound by the bill of lading terms and that the relationship here was one of affreightment, so that in this case which can only be one of negligent towage petitioner is entitled to be freed from liability under the Harter Act defenses, the Court of Appeals affirms the trial court on the ground petitioner failed to prove the necessary facts. This was manifestly not the case: It was undisputed and affirmed by libellant's witnesses that the bill of lading was issued, R. 294-297, 329, that Magco Towing Co. was a water carrier of bulk commodities on the inland waterways of Texas and Louisiana, R. 665, that it had other customers besides the allied corporations Magnet Cove Barium Corporation and Magcobar, R. 665, that it owned and operated in the performance of its carriage contracts its own tugs and barges and where necessary to fulfill its obligations to shippers that it chartered from others tugs and barges. R. 666. What further proof was lacking?

As a matter of law, since Magco Towing Co. held itself out to the shipping public to carry bulk commodities, Magco Towing Co. (in whose shoes of course rightfully petitioner stands vis-a-vis the cargo owner, as *Southwestern Sugar & Molasses Co. v. River Terminals Corp.* plainly holds) was a common carrier by water, Section 902(d), Title 49, U.S.C. (Section 302(d) of the Interstate Commerce Act, Part III, Water Carriers, printed supra), even though exempt from statutory requirements by reason of being a bulk carrier. Section 903(b), Title 49, U.S.C. Please see *Cornell Steamboat Co. v. U. S.*, 321 U.S. 634, 64 S.Ct. 768 (1944).

As a common carrier on inland waterways petitioner therefore had as a matter of law the Harter Act defenses. *Cornell Steamboat Co. v. U. S.*, 321 U.S. 634, 64 S.Ct. 768 (1944).

But even if Magco Towing Co. be deemed a private carrier, as shown above the contract under which the cargo here was being transported incorporated the defenses accorded a carrier by the Harter Act, *Koppers Connecticut Coke Co. v. James McWilliams Blue Line, Inc.*, 89 F.2d 865 (2 Cir. 1937), and the decision of the Court of Appeals is clearly contrary to the settled law.

4. In affirming the trial court by holding that the evidence was sufficient to support a finding that petitioner's tug was negligent in its navigation of the tug and barge, the Court of Appeals had no help or guidance from the trial court, which made no fact findings at all and simply held ". . . as a matter of law that the tow was negligent in its handling of the barge . . ." and thus caused the stranding.

Recognizing the settled law that a vessel is not at fault where it strands on an unmarked shoal within the confines of a navigable channel, *The Arlington*, 19 F.2d 285, 54 A.L.R. 101, 1927 A.M.C. 900 (2 Cir. 1927), *Exner Sand & Gravel Corp. v. Gallagher Bros. Sand & Gravel Corp.*, 157 F.2d 291, 1946 A.M.C. 1449 (2 Cir. 1946), nevertheless the Court of Appeals held "permissible inferences" allowed a finding of negligence.

Undoubtedly, as a matter of law, where the undisputed testimony of the tug's crew that the barge stranded upon an unmarked sand shoal within the confines of the navigable channel was corroborated by the insurance company's own agent who immediately investigated the cir-

cumstances of the stranding on the spot, taking pictures to support his conclusions, there can be no doubt that in basing its holding on inferences drawn from evidence not even arguably in direct conflict, the Court of Appeals' decision is directly contrary to the settled law that a finding must be based not upon speculation but on proof. It is in direct conflict with decisions of this Court, *Galloway v. United States,* 319 U.S. 372, 63 S.Ct. 1077, 1089 (1943) and *Kelly v. Jackson,* 6 Pet. 622, 631, 8 L.Ed. 523 (1832), the decision of the Court of Appeals of the District of Columbia, *Stone v. Stone,* 136 F.2d 761, 764 (1943), and as well also with its own decisions, *Reuter v. Eastern Air Lines,* 226 F.2d 443, 445-6 (5 Cir. 1955) and *Rooney v. Nuta, et al* (*Yacht Ronar*), 267 F.2d 142, 1960 A.M.C. 1212 (5 Cir. 1959), cert. denied 361 U.S. 884, 80 S.Ct. 156.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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